SOO CHENG LIN v. DR KOK CHOONG SENG & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEALS NO: B-02-710-03-2013 & B-02-(W)-1731-10-2015]
31 MAY 2016

TORT: *Negligence – Medical negligence – Surgical procedure – Treatment in private hospital – Claim for medical expenses paid by insurer – Whether payment made by insurer under contract of insurance – Whether contractual agreement between claimant and insurance company independent of negligent medical act – Whether unjust enrichment – Whether claimant entitled to claim – Civil Law Act 1956, s. 28A(1)(a)*

TORT: *Negligence – Vicarious liability – Medical negligence – Surgical procedure – Treatment in private hospital – Whether claimant a patient dependent on protection of hospital against risk of injury – Whether hospital owed a non-delegable duty of care to claimant*

The plaintiff had a lump in his left forearm and sought medical advice from a surgeon ('the first defendant') at his clinic. Subsequently, the first defendant performed a surgery to remove the lump at the Sunway Medical Centre ("the second defendant"). After the operation, the plaintiff alleged that he had experienced pain and numbness at the area of his left forearm where the surgery took place. The plaintiff had lost 6cm or 90% of his left median nerve. To repair the lost nerve, the plaintiff underwent a microscopic reconstruction on his damaged left median nerve utilising the nerve from his left leg which was carried out by another doctor from Pantai Medical Centre. The plaintiff then took out the present legal suit against the first defendant premised on the tort of negligence in performing the operation to extract the lump from his left forearm. It was alleged that in view of the aforesaid negligence the plaintiff had suffered injuries such as pain in his hand and foreman and weakness and partial loss of sensation in the left arm. As for the second defendant, the plaintiff alleged that it had failed to provide a reliable and safe system for the treatment and referral of patients, including referring the plaintiff to an appropriate expert. That duty, as contended by the plaintiff, was a non-delegable duty. The High Court found that the first defendant was negligent in his duty of care and the second defendant was vicariously liable for the negligence of the first defendant. A sum of RM50,000 being damages for pain and suffering was awarded to the plaintiff. However, the plaintiff's claim of RM19,632 being medical fees was rejected. The plaintiff's appeal concerned the quantum of damages awarded for pain

A and suffering and the rejection of the said claim for medical fees (Appeal 710). As for the second defendant, an appeal was lodged against the finding of being vicariously liable for the negligence of the first defendant (Appeal 1731). Both appeals were heard together. The issues that arose for determination were (i) whether the trial judge was correct to reject the
B plaintiff's claim for medical expenses; (ii) whether the trial judge was correct in awarding only the sum of RM50,000 as damages for pain and suffering of the plaintiff; and (iii) whether the trial judge was correct in finding that the second defendant was vicariously liable for the negligence of the first defendant.

C **Held (allowing Appeal 710; dismissing Appeal 1731)**
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The pivotal words in s. 28A(1)(a) of the Civil Law Act 1956 are 'damages recoverable from personal injury' and 'any sum paid or payable in respect of the personal injury under any contract of assurance
D or insurance'. Giving these words their plain and natural meaning, they include the medical expenses paid by the plaintiff's insurer herein as it could not be disputed that the claimed medical expenses were damages recoverable from the plaintiff's personal injury and the payment made by the plaintiff's insurer was money paid under a contract of insurance.
E The plaintiff had in his wisdom taken out a private medical insurance and had paid the necessary premium to be covered. This was a contractual arrangement between the plaintiff and his insurance company which was independent of the negligent act of the first and second defendants. In any event, there was no unjust enrichment
F here. The plaintiff was therefore entitled to his claim of RM19,632.84. (paras 26, 28 & 29)

(2) The plaintiff had suffered numerous injuries *ie* loss of a major segment of the left median nerve and deformity of the fingers and nails of the left hand. He also had to go through an unnecessary operation in the left leg
G to harvest the sural nerve. The sum of RM50,000 was well within compendium for injuries similar to that of the plaintiff's injuries. That being the case, there was no reason to intervene the judge's award of RM50,000. (paras 31 & 32)

(3) The second defendant was a private hospital providing healthcare to the
H public for a fee. The plaintiff, through a patient of the first defendant, once admitted as a client/patient in the second defendant, was also a patient of the second defendant. The moment the plaintiff became a patient of the second defendant, he was 'a patient vulnerable and/or dependent on the protection of the second defendant against the risk of
I injury'. The second defendant as the hospital and the first defendant as the surgeon needed each other to treat and deliver healthcare services to

the public. Thus, the second defendant owed a non-delegable duty of care to the plaintiff for the simple reason that it, by its nature of existence as a health care service provider to the public, had undertaken to ensure that he or she was protected from harm's way. (paras 64, 65 & 68)

Bahasa Malaysia *Headnotes*

Plaintif mempunyai ketumbuhan dalam lengan bawah kirinya dan mendapatkan nasihat perubatan daripada pakar bedah ('defendan pertama') di kliniknya. Seterusnya, defendan pertama melakukan pembedahan untuk mengeluarkan ketumbuhan tersebut di Sunway Medical Centre ('defendan kedua'). Selepas pembedahan, plaintif mendakwa mengalami kesakitan dan perasaan kebas di kawasan lengan bawah kirinya di mana pembedahan itu berlaku. Plaintif kehilangan 6cm atau 90% saraf median bahagian kiri. Untuk memperbaiki saraf itu, plaintif terpaksa menjalani pembinaan semula mikroskopik pada saraf median sebelah kirinya yang rosak yang dijalankan oleh seorang doktor yang lain dari Pantai Medical Centre. Plaintif kemudiannya memulakan tindakan guaman terhadap defendan pertama berasaskan tort kecuaian dalam menjalankan pembedahan bagi mengeluarkan ketumbuhan dari lengan kirinya. Plaintif mendakwa bahawa akibat kecuaian itu, plaintif mengalami kecederaan seperti kesakitan dalam tangan dan formen dan kelemahan serta kehilangan deria rasa separa di lengan kirinya. Bagi defendan kedua pula, plaintif mendakwa bahawa ia telah gagal menyediakan sistem yang boleh dipercayai dan selamat untuk rawatan dan rujukan pesakit-pesakit, termasuk gagal merujuk plaintif kepada pakar yang sesuai. Tanggungjawab itu, seperti yang dihujahkan oleh plaintif, adalah tanggungjawab bukan diwakilkan. Mahkamah Tinggi mendapati bahawa defendan pertama cuai dalam tanggungjawab berjaga-jaga dan defendan kedua adalah bertanggungan secara vikarius untuk kecuaian defendan pertama. Jumlah RM50,000 iaitu ganti rugi untuk kesakitan dan penderitaan telah diawardkan kepada plaintif. Walau bagaimanapun, tuntutan plaintif untuk bayaran perubatan berjumlah RM19,632 telah ditolak. Plaintif merayu berkenaan kuantum ganti rugi yang diawardkan untuk kesakitan dan penderitaan dan penolakan tuntutan untuk bayaran perubatan tersebut (Rayuan 710). Bagi defendan kedua pula, satu rayuan telah difailkan terhadap dapatan bahawa defendan kedua bertanggungan secara vikarius untuk kecuaian defendan pertama (Rayuan 1731). Kedua-dua rayuan didengar bersama. Isu-isu yang berbangkit untuk pertimbangan adalah (i) sama ada hakim bicara betul apabila menolak tuntutan plaintif untuk bayaran perubatan; (ii) sama ada hakim bicara betul dalam mengawardkan hanya jumlah RM50,000 sebagai ganti rugi untuk kesakitan dan penderitaan; dan (iii) sama ada hakim bicara betul apabila mendapati bahawa defendan kedua bertanggungan secara vikarius untuk kecuaian defendan pertama.

Diputuskan (membenarkan Rayuan 710; menolak Rayuan 1731)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Perkataan penting dalam s. 28A(1)(a) Akta Undang-Undang Sivil 1956 adalah 'damages recoverable from personal injury' dan 'any sum paid or payable in respect of the personal injury under any contract of assurance or insurance'. Dengan memberikan perkataan-perkataan ini maksud yang jelas dan semula jadi, ia termasuk bayaran perubatan yang dibayar oleh syarikat insurans plaintif kerana ia tidak boleh dipertikaikan bahawa bayaran perubatan yang dituntut adalah ganti rugi boleh dipulih daripada kecederaan diri plaintif dan bayaran yang dibuat oleh syarikat insurans plaintif adalah wang dibayar di bawah kontrak insurans. Plaintif telah mengambil insurans perubatan swasta dan telah membayar premium yang diperlukan untuk perlindungan. Ini adalah kontrak persetujuan antara plaintif dan syarikat insurans yang bebas daripada perbuatan cuai defendan pertama dan kedua. Dalam apa jua keadaan, tiada pengayaan tidak adil di sini. Oleh itu plaintif berhak untuk memperolehi tuntutan RM19,632.84.

(2) Plaintif telah mengalami beberapa kecederaan iaitu kehilangan segmen utama saraf median sebelah kiri dan kecacatan jari serta kuku tangan kirinya. Dia juga terpaksa melalui pembedahan yang tidak perlu dalam kaki kirinya untuk memotong saraf suralnya. Jumlah RM50,000 adalah terangkum dalam compendium bagi kecederaan yang sama dengan kecederaan plaintif. Oleh itu, tiada alasan untuk campur tangan award RM50,000 yang telah diberikan oleh hakim.

(3) Defendan kedua adalah hospital swasta yang menyediakan penjagaan kesihatan kepada orang ramai dengan bayaran. Plaintif, sebagai pesakit defendan pertama, setelah dimasukkan sebagai pelanggan/pesakit dalam defendan kedua, adalah juga pesakit defendan kedua. Apabila plaintif menjadi pesakit defendan kedua, dia adalah 'a patient vulnerable and/or dependent on the protection of the second defendant against the risk of injury'. Defendan kedua sebagai hospital dan defendan pertama sebagai pakar bedah memerlukan antara satu sama lain untuk merawat dan memberikan perkhidmatan penjagaan kesihatan kepada orang ramai. Oleh itu, defendan kedua mempunyai tanggungjawab bukan diwakilkan kepada plaintif kerana melalui sifat semula jadi kewujudannya sebagai penyedia perkhidmatan penjagaan kesihatan kepada orang awam, telah ditanggung untuk memastikan bahawa pesakit itu dilindungi dari apa-apa yang memudaratkan.

Case(s) referred to:

Adventist Hospital & Clinic Services (M) v. Kee Boon Suan & Anor and Another Case [2015] 8 CLJ 676 HC ***(refd)***

Burnie Port Authority v. General Jones Pty Limited (1994) 179 CLR 520 ***(refd)***

Cassidy v. Ministry of Health [1951] 1 All ER 574 ***(refd)***

Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & Ors [2011] 1 LNS 33 HC ***(refd)***

Dennis Lee Thian Poh & Ors v. Dr Michael Samy & Anor [2012] 1 LNS 825 CA ***(refd)***

Frank Astle Ward v. Malaysian Airlines System Bhd [1991] 3 CLJ 2053; [1991] 1 CLJ (Rep) 117 SC ***(refd)***

Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy [2005] 2 CLJ 195 HC ***(refd)***

Kondis v. State Transport Authority (1984) 55 ALR 225 ***(refd)***

Parry v. Cleaver [1969] 1 All ER 555 ***(refd)***

PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***

Sanmarkan Ganapathy & Anor v. Dato' Dr V Thuraisingham & Ors [2011] 1 LNS 1090 HC ***(refd)***

Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor [2012] 3 CLJ 450 CA ***(refd)***

Southern Hospital Sdn Bhd v. Indra Devi a/p Gopinathan Nayar (Suing as the Personal Representative and Successor of Purushothaman Nair (Deceased) (Civil Appeal No M-04-139-6-2014) (Unreported) ***(refd)***

Woodland v. Essex County Council [2013] 1 All ER 670 ***(refd)***

Wu Siew Yong v. Pulau Pinang Clinic Sdn Bhd & Anor [2011] 1 CLJ 255 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28A(1)(a)

For the appellant - PS Ranjan & Dhillon; M/s PS Ranjan & Co
For the respondents - Raja Eileen Soraya & Joni Benedict; M/s Raja, Darryl & Loh

[Editor's note: Appeal from High Court, Shah Alam; Suit No: 22-1486-2006 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] Before us are two appeals, namely, B-02-710-03-2013 (Appeal No. 710) and B-02(W)-1731-10-2015 (Appeal No. 1731) stemming from one judgment of the High Court at Shah Alam.

[2] Appeal No. 710 is an appeal by the plaintiff while Appeal No. 1731 is an appeal by the second defendant. Both appeals were heard together with the consent of respective counsels.

[3] In the High Court, the learned judge was concerned with a medical negligence suit where the plaintiff had sued the surgeon (first defendant) for his negligent treatment of the plaintiff's left forearm and second defendant/ hospital, also known as Sunway Medical Centre, as a provider of healthcare.

[4] At the end of the trial the learned judge found that the first defendant/surgeon was negligent in his duty of care and the second defendant was vicariously liable for the negligence of the first defendant. A sum of RM50,000 being damages for pain and suffering was awarded to the plaintiff. However, the plaintiff's claim of RM19,632.84 being medical fees was rejected. No appeal was lodged by the first defendant.

[5] As for the second defendant, an appeal was lodged against the finding of being vicariously liable for the negligence of the first defendant. As for the plaintiff, his appeal concerns the quantum of damages awarded for pain and suffering and the rejection of the claim for medical fees of RM19,632.84. For convenience the parties will be referred to as they were referred to in the High Court.

Background Facts

[6] The plaintiff had a lump in his left forearm and sought medical advice from the first defendant at his clinic at Taman Desa on 9 September 2004. He had been advised by the first defendant to undergo surgery to remove the lump. On 14 September 2004, the first defendant performed surgery to remove the lump at the premises of the second defendant.

[7] After the operation, the plaintiff alleged that he had experienced pain and numbness at the area of his left forearm where the surgery took place. It had appeared that the plaintiff had lost 6cm or 90% of his left median nerve.

[8] To repair the lost nerve, the plaintiff underwent a microscopic reconstruction on his damaged left median nerve utilising the nerve from his left leg which was carried out by Dr Ranjit Singh from Pantai Medical Centre on 21 October 2004.

[9] The plaintiff then took out this legal suit against the first defendant premised on the tort of negligence in performing the operation to extract the lump from his left forearm. It was alleged that in view of the aforesaid negligence the plaintiff had suffered injuries such as pain in his hand and foreman and weakness and partial loss of sensation in the left arm.

[10] As for the second defendant, the plaintiff had alleged that it had failed to provide a reliable and safe system for the treatment and referral of patients, including referring the plaintiff to an appropriate expert. That duty as contended by the plaintiff was a non-delegable duty.

Our Grounds Of Decision

[11] From the submissions of respective counsels, it can be said that there are basically three issues requiring our determination and they are these:

(i) whether the learned judge was correct to reject the plaintiff's claim of medical expenses in the sum of RM19,632.84?;

(ii) whether the learned judge was correct in awarding only the sum of RM50,000 as damages for pain and suffering of the plaintiff?; and

(iii) whether the learned judge was correct in finding that the second defendant was vicariously liable for the negligence of the first defendant?

Issue 1 – Rejection Of The Claim Of Medical Expenses Of RM19,632.84

[12] There is no dispute as to the existence of this claim and the amount thereof. There is also no dispute that the plaintiff had been compensated by his insurance cover. What is in dispute now is simply whether the second defendant is obliged to pay the plaintiff in view of the compensation paid by his insurance company.

[13] The learned judge rejected this claim premised on the ground that the medical expenses had been paid by his insurer and to allow such a claim in the circumstances where the plaintiff had suffered no loss would amount to "unjust enrichment" which is prohibited by law. She also referred to s. 28A of the Civil Law Act 1956 and found it to be inapplicable in this case.

[14] From the submissions of respective counsels, one can say that the answer to the issue at hand is one of interpretation of s. 28A(1)(a) which reads as follows:

> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act; ...

[15] The question then which confronts us is this:

> Are the medical expenses amounting to RM19,632.84 "damages recoverable from personal injury" and a sum paid for personal injury under "a contract of assurance or insurance" despite the fact that the Plaintiff had not paid the same?

[16] Learned counsel for the plaintiff refers us to two cases, namely, *Frank Astle Ward v. Malaysian Airlines System Bhd* [1991] 3 CLJ 2053; [1991] 1 CLJ (Rep) 117; [1991] 3 MLJ 317 and *Southern Hospital Sdn Bhd v. Indra Devi a/p Gopinathan Nayar (suing as the personal representative and successor of Purushothaman Nair (deceased)* – Civil Appeal No M-04-139-6-2014. It is counsel's contention that the aforesaid cases represent the correct approach in interpreting s. 28A(1)(a) in that insurance payments arising from personal injury should not be taken into account for the calculation of damages arising from personal injury claims.

[17] Counsel for the second defendant however relies on the case of *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* [2012] 3 CLJ 450 and forcefully contends that this case represents the correct approach as it had

considered *Frank Astle Ward v. Malaysian Airlines System Bhd* (*supra*) and had limited the applicability of the rationale therein to loss of earnings and does not apply to special damages in the context of s. 28A(1)(a).

[18] On a cursory browse of the aforesaid cases, there appears to be conflicting interpretations of s. 28A(1)(a), hence calls for a detail analysis of the same in this judgment.

[19] In the *Frank Astle Ward* case (*supra*) the facts were these. The appellant was a pilot employed by the respondent Malaysia Airlines System (MAS) and on 6 July 1982, an aeroplane flown by the appellant crash landed in Sarawak, as a result of which the appellant suffered various injuries, including serious head injury. MAS admitted 100% liability.

The appellant received a sum of RM600,000 from MAS under two insurance policies taken out by MAS namely:

(i) RM300,000 under a policy for loss of commercial pilot's licence; and

(ii) RM300,000 under a personal accident policy taken out by MAS for all its employees under the contracts of employment.

The trial judge assessed general and special damages at RM301,250; however, it was held that the sum of RM300,000 under (b) above should be deducted.

The appellant appealed, amongst others, against the legality of deduction of RM300,000.

[20] The Supreme Court allowed the appeal and decided the dispute premised solely on what s. 28A(1)(a) of the Civil Law provides. This is what the court said at p. 321:

> To put the issue of deductibility beyond doubt in the present appeal, our Parliament has, fortunately for the appellant, introduced s. 28A(1)(a) by Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere compromise solution against deductibility. We agree with Mr. R.K. Nathan that the plain meaning of the words used in that section should be adopted for purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death "under any contract of assurance or insurance" shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

[21] This court in *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* (*supra*) had the occasion to consider the application of s. 28A(1)(a) of the Civil Law Act. The facts there were these. The respondents there were involved in a road accident and had sought treatment from Gleneagles Medical Centre

for the injuries sustained by them. The first respondent's medical expenses were paid by Prudential Assurance Malaysia Bhd whereas the second respondent paid for his own medical expenses. The High Court affirmed the Sessions Court's decision wherein both the respondents' claim against the appellant for their medical expenses was allowed. Dissatisfied with the said decisions, the appellant appealed. The issue that arose for consideration herein was whether the appellant was liable to reimburse the first respondent's medical expenses incurred at the hospital where the same had been paid by the insurer. The appellant submitted that he should not be made liable to pay for the first respondent's medical expenses since it was paid by the insurer and not by the first respondent, who relied on the case of *Frank Astle Ward v. Malaysian Airlines System Bhd* [1991] 3 CLJ 2053; [1991] 1 CLJ (Rep) 117 to submit that the High Court was right in upholding the decision of the Sessions Court which allowed the first respondent's claim for medical expenses even though the amount had already been paid by the insurer.

[22] One can say the issue in *Sathisvaran* is similar to the issue at hand. This is what the court, after giving deliberation of the rationale in the *Frank Astle Ward* case, said there:

> [12] It is clear that in *Frank Astle Ward* (*supra*), the issue of deductibility, arose in relation to payment in respect for the loss of earnings which forms part of general damages. And s. 28A(1) of the CLA has clearly stated that such insurance payments are not deductible. That is not the situation here. In the present case, the claim of the 1st plaintiff is for the medical expenses incurred while undergoing treatment at Gleneagles Medical Centre.

[23] Learned counsel for the plaintiff in his submission said this:

> In distinguishing *Ward*, but also recognising that "insurance payments are not deductible", the Court of Appeal had been wrongly advised by counsel that s. 28A(1)(a) of the Civil Law Act 1956 as decided in *Ward* applies to "loss of earnings" only. Those latter words are not mentioned in that part of the Act. The sub-section refers to "damages", which word includes general damages, aggravated damages, exemplary damages, and special damages, such as medical expenses.
>
> The term "loss of earnings" used by the Court of Appeal in *Sathisvaran* is found, not in s. 28(A)(1)(a), but in s. 7 of the Act. Section 7 is not relevant because it concerns fatal accident cases (in the present appeal, the victim of the tort is alive).
>
> Therefore, the term "loss of earnings" and therefore *Sathisvaran* are not applicable to this case.
>
> The decision of the Court of Appeal in *Sathisvaran* is *per incuriam* as it had been wrongly advised by counsel that s. 28A(1)(a) applies only to a claim for general damages.

A In any case, the Court of Appeal in *Sathisvaran* did not seek to disagree with the Supreme Court in *Ward*. It had only been wrongly advised by counsel regarding the decision in *Ward*.

[24] In rebuttal, counsel for the second defendant again forcibly submits that medical expenses are in fact special damages and unless that has been B incurred by the plaintiff, no claim can be made for the simple reason that the plaintiff had suffered no loss. And to allow it would amount to undue enrichment. Counsel also refers to the case of *Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy* [2005] 2 CLJ 195; [2005] 2 MLJ 679 where the learned judge opined that medical expenses relating to a personal injury case C which are paid by the insurers cannot be claimed by the insured. This is premised on the principle that recovery of damages cannot be used as a mechanical device for unjust enrichment.

[25] In our considered view, we prefer the approach advanced by counsel for the plaintiff and our reasons are these. As to whether medical expenses D in the circumstances before us are deductible is now governed by statute in the form of s. 28A(1)(a) of the Civil Law Act as made clear by the Supreme Court in the *Frank Astle Ward* case. That being the case, then it is purely an interpretation of the aforesaid section. The law on construction of statute is clear and it is this. In construing any statute, the first task is to look at the E words in the legislation and apply the plain meaning of the words in the statute and if there is no ambiguity to the words used, the court is duty bound to accept it even if it may lead to mischief. The rationale is simple. The court's duty is not to legislate, that duty lies with the Parliament. If however the words used are not clear, then the courts may adopt the F purposive approach in construing the meaning of the words used (see *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685).

[26] The pivotal words in s. 28A(1)(a) of the Civil Law Act are "damages recoverable from personal injury" and "any sum paid or payable in respect of the personal injury under any contract of assurance or insurance". Giving G these words their plain and natural meaning, it is our view that they include the medical expenses paid by the plaintiff's insurer in this case as it cannot be disputed that the claimed medical expenses are damages recoverable from the plaintiff's personal injury and the payment made by the plaintiff's insurer was money paid under a contract of insurance.

H **[27]** In respect of the contention of the application of unjust enrichment, it should firstly be noted that it is an equitable concept developed by common law and with respect, when there is statutory provision catering for the specific circumstance, equity does not apply. Here we have s. 28A(1)(a) of the Civil Law Act which is a specific provision of law regarding the I deductibility of payments under a contract of insurance for personal injury and any attempt to whittle down the provision would be contrary to law.

[28] Further and in any event, we are of the view that there is no unjust enrichment here. It is undisputed that the plaintiff had in his wisdom taken out a private medical insurance and had paid the necessary premium to be covered. This is a contractual arrangement between the plaintiff and his insurance company which is independent of the negligent act of the first and second defendants. We can do no better than adopt what was stated by Lord Reid in *Parry v. Cleaver* [1969] 1 All ER 555:

> … As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money: if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest. I need not quote from the well-known case of *Bradburn v. Great Western Ry. Co* but I may refer to an old Scottish case, *Forgie v. Henderson* where the pursuer was assaulted by the defender. During part of his resulting illness he received an allowance from a friendly society, and Lord Chief Commissioner Adam said in charging the jury:
>
> > I do not think you can deduct the allowance from the Society, as that is of the nature of an insurance, and is a return of money paid.
>
> And I would also refer to the judgment of Asquith, L.J., in *Shearman v. Folland* where he said:
>
> > If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid to the latter and appropriating that benefit to himself …

[29] For reasons stated above, we are of the view that the plaintiff is entitled to his claim of RM19,632.84.

Issue 2: The Award Of RM50,000 As Damages For Pain And Suffering

[30] Counsel for the appellant during the hearing had informed the court that the original claim of RM150,000 was in fact unrealistic but urged the court to award the sum of RM100,000.

[31] The injuries suffered by the plaintiff as set out by us for the plaintiff were these:

Injuries to the left hand

- loss of a major segment of the left median nerve measuring about 6cm;
- left median nerve palsy resulting in severe pain and numbness in the left forearm;

- pain and reduced sensation in the left thumb, index, middle and ring fingers;
- unnecessary second operation on the left leg and third operation on the hand;
- microscopic surgical re-construction of the left median nerve using the sural nerve from the left leg as graft;
- physio and rehabilitative therapy for six months leading to partial recovery of the nerve function of the left hand;
- continued reduced sensation in the left thumb, index and middle fingers;
- pain and discomfort in the left hand on cold days;
- deformity of the fingers and nails of the left hand;
- muscle wasting at the left forearm;
- unnecessary 5 inches scar on the left forearm;
- wasting and mild limitation of motion of the entire left forequarter;
- unpleasant feelings in the hands (dysthesia);
- mild contractures of the metacarop-phalangeal joints;
- disturbed autonomic function of the left hand; and
- limitation in carrying out some activities of daily living as a result.

Injuries to left leg

- unnecessary operation in the left leg to harvest the sural nerve;
- 9 inches long scar in the left leg that runs dorsolaterally along the calf;
- reduced sensation over the left foot;
- difficulty in walking long distances; and
- continued numbness in the left foot.

[32] Counsel for the second defendant in her submission had pointed out to us that the sum of RM50,000 is well within compendium for injuries similar to that of the plaintiff's injuries. That being the case, we see no reason to intervene the learned judge's award of RM50,000.

Issue 3: The Vicarious Liability Of The Second Defendant

[33] As pointed out by learned counsel for the second defendant, the learned judge had prepared her grounds of judgment on 26 March 2014 which was some two years after her oral decision on 28 February 2012. It also appeared that her grounds of decision were fashioned as a rebuttal to

the matters raised in the notice of cross-appeal. Learned counsel for the second defendant submits that this is highly irregular. But having pointed that out, she did not further submit as to what this court should do, either to ignore the grounds of judgment or what. That being the case, we shall take the grounds of judgment as we find it and deliberate as to whether they are correct in law.

[34] The learned judge's rationale for finding the second defendant liable for the negligence of the first defendant can be summarised as follows. The fact that the second defendant had no control over the first defendant cannot be taken as a significant factor in determining the liability of the second defendant as in this case, the second defendant owed the plaintiff a non-delegable duty of care. This is how Her Ladyship puts it:

> A 'non-delegable duty of care' is the category of tort liability to not only take care but ensure that care is taken. The duty has been described as imposing a more stringent duty than that which a result in vicarious liability because the duty imposed is to "ensure that reasonable care is taken".
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> This area of liability has the effect of fixing liability for negligent acts to a particular person, even if that person has delegated responsibility for performance of those acts to a third party, for example an independent contractor. Non delegate duties of case have been described as a kind of vicarious liability. Non-delegable duties of care are significant in that they form an exception to the normal rule that a person will not be liable for the acts of independent contractors.
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> In the English case of *Cassidy v. Ministry of Health* CA 1951, the Court considered the liability in negligence of the respondent for the negligence of doctors employed by it. The Court held that the Ministry was liable for the negligence of doctors who were employed by it on contracts of service.

[35] Her Ladyship then went on to find that the plaintiff was in a position of dependence or vulnerability of the second defendant, hence giving rise to this "non-delegable" duty. The case of *Burnie Port Authority v. General Jones Pty Limited* (1994) 179 CLR 520 was also relied on. In that case, the High Court of Australia opined as follows:

> It has long been recognised that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken'. Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken.

[36] Her Ladyship had also justified her decision premised on policy considerations. This is what she said:

> In addition, there are sound policy considerations to justify the finding of liability against the 2nd Respondent. The 2nd Respondent runs a commercial enterprise for which it earns profits. Since the 2nd Respondent is the party primarily benefiting from the enterprise, in all fairness the 2nd Respondent should also bear a corresponding liability for losses incurred in the conduct of the enterprise. In addition, the imposition of liability for independent contractors would be a powerful incentive for such enterprises to take due care to ensure the appointment of competent and skilled medical personnel.

[37] Learned counsel for the second respondent submits that the learned judge erred when she failed to appreciate the relationship between the first and second defendants is a determinative factor in determining the relationship between the plaintiff and the second defendant.

[38] Clauses 2 and 13 of the doctor's practicing agreement were referred to by learned counsel and they respectively read as follows:

Clause 2:

(a) To allow the Consultant the right and freedom to operate his medical specialist service at the Hospital without undue interference or interruption.

(b) To assist the Consultant and to provide the necessary back-up services whenever required so that the Consultant may operate his consultancy service in accordance with a patient's reasonable expectation of a specialists Hospital.

Clause 13:

(a) The Consultant shall be an independent contractor and not the agent, servant or representative of SMC (Sunway Medical Center) and neither party hereto shall have any authority to make any statements, representations or commitments of any kind on behalf of the other party. The Consultant shall be responsible for the conduct and behavior of his agents/servants and/or employees in the Hospital and should any of his agents/servants and/or employees act against the interests of the Hospital, the Consultant shall be deemed personally responsible for any loss, damage and/or consequence arising there from and shall immediately remove such person on written demand by SMC.

(b) The Consultant shall be personally liable for any acts of negligence or omission committed by himself personally or by his agents/servants and/or employees in the conduct of his professional practice at the Hospital. SMC shall not be responsible for any tortious acts of the Consultants or those he is responsible for …

[39] From the just quoted clauses, there is little doubt that the first defendant was not employed by the second defendant and the first defendant was to be solely responsible for his conduct in his professional work as a doctor. In short, the first defendant had full control over the treatment and care of his patients and he does not receive any remunerations from the second defendant. The obligations of the second defendant is simply to provide "back up services" whenever required by the first defendant.

[40] Premised on the above, learned counsel for the second defendant submits that the learned judge had erred when she relied on the dissenting judgment of Lord Denning in the English case of *Cassidy v. Ministry of Health*; CA [1951] 1 All ER 574 when the majority decision had held the doctors there were employees of the health authority, hence distinguishable to the case before us. Further she submits that the English cases cited by learned counsel for the plaintiff or relied by the learned judge are not applicable to the case before us for the simple reason that the second defendant is a private hospital and the English cases relate to public hospitals where there are statutory duties imposed by the Public Health Act 1936.

[41] Learned counsel for the second defendant then referred us to several local cases and they are these – *Wu Siew Yong v. Pulau Pinang Clinic Sdn Bhd & Anor* [2011] 1 CLJ 255; [2011] 3 MLJ 506; *Sanmarkan Ganapathy & Anor v. Dato' Dr V Thuraisingham & Ors* [2011] 1 LNS 1090; [2012] 3 MLJ 817; *Dennis Lee Thian Poh & Ors v. Dr Michael Samy & Anor* [2012] 1 LNS 825; [2013] 3 MLJ 857; *Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & Ors* [2011] 1 LNS 33; [2011] 2 AMR 741 and *Adventist Hospital & Clinic Services (M) v. Kee Boon Suan & Anor and Another Case* [2015] 8 CLJ 676.

[42] From our perusal of the above cases, there appears to be conflicting views as to whether a private hospital, similar to that of the second defendant, should be vicariously liable for the negligence of an independent consultant/doctor, similar to a person like the first defendant. The factual matrix in the cited cases are similar to the case at hand in that the consultant doctor had been sued for negligence while conducting his surgery at the private hospital and his relationship with the private hospital was not one of employer-employee relationship but one of independent consultant where the private hospital exercised no control over him. One line of authorities is premised on the principle of law that the private hospital should not be held liable for negligence of the independent consultant/doctor when there is no control of the conduct of the same by the private hospital. The other line of authorities is premised on the principle of law that despite the independence of the consultant/doctor and lack of complete control by the private hospital, a duty of care is imposed on the private hospital and there has been an assumption of responsibility by the same and that responsibility cannot be delegated.

[43] At the outset of the hearing, respective counsel had informed the court that there is no appellate court decision on this area of law and our research confirms the same. Be that as it may, the area of law is in the realm of common law which our courts are duty bound to develop if the circumstances demand such development. Such development will and should only occur to meet the never ending evolving challenges we have today. This no doubt involves unavoidable consideration of public policy by the courts.

[44] The issue which had arisen there was whether the private hospital is vicariously liable for the negligent act of the independent consultant/doctor.

[45] In *Wu Siew Yong* (*supra*), the Penang High Court declined to find against the private hospital and His Lordship's reasoning are these:

> [22] Having perused the whole agreement D18 as well as the evidence produced and applying the tests as laid down above, I am inclined to agree with the submission by the first defendant that there is an absence of such special relationship between first defendant and second defendant on the following grounds:
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> (a) The second defendant is free to operate his own clinic, accepting whosoever patients he wants and the second defendant is at liberty to charge a different fee from the patient despite there is a schedule of fees.
>
> (b) The second defendant has full control over his own clients/patients in their treatment, management and care. He controls over his own work and the method he wishes to perform his work.
>
> (c) The first defendant does not pay any remuneration to the second defendant but conversely, the second defendant would have to allow 22.5% of his gross fees earned to be deducted towards usage of first defendant's facilities (cl. 5 D18). Bearing in mind that the first defendant is providing all the facilities of a hospital to the second defendant, the deduction of 22.5% of the gross fees earned by the second defendant can only be construed as payment by the second defendant for such usage of those facilities only. I do not agree with the plaintiff's contention that such payment connotes a special relationship of an employer-employee.
>
> (d) The second defendant will have to immediately take out insurance coverage and shall maintain such policies to keep himself insured at all times during the subsistence of the agreement with the first defendant. (Clause 7(f) D18). If there is such an employer-employee relationship as contended by the plaintiff, insurance coverage of an employee would be generally provided by employer if the employee is not covered under SOCSO.
>
> (e) On cl. 6 which provides that the first defendant shall allow the second defendant 30 days leave in every calendar year, plaintiff contended this shows the special relationship of employer/employee. Reading the second paragraph that follows in cl. 6, which

requires the second defendant to arrange and secure the services of a consultant colleague to provide cover during any period of leave, it corroborated evidence of the first defendant that there should be no vacancy of any consultant in attendance as the hospital must have a consultant at all times. If there is employer-employee relationship as contended by the plaintiff, when the employer who retains his full discretion to approve vacation leave and once the leave of the employee is approved, it becomes the duty of the employer to arrange for a replacement worker and not the duty of the employee to find such a replacement before he goes on his vacation leave.

(f) The negligent act and wrongful act complained of by the plaintiff are in relation to the personal acts of the second defendant in the treatment, management and care of the plaintiff which the second defendant retains full control. Therefore, first defendant cannot be said to be vicariously liable.

[46] From the above, it can be easily seen that once the learned Judicial Commissioner (as he then was) found that the consultant/doctor was operating independent of the private hospital, no vicarious liability could arise. The same Judicial Commissioner in *Sanmarkan Ganapathy & Anor* (*supra*) used the same reasoning for not finding liability against the private hospital.

[47] In *Dennis Lee Thian Poh* (*supra*), the learned judge also found that the private hospital was not vicariously liable premised however on the ground that the principle of non-delegable duty of care did not apply. This is what the learned judge said:

Vicarious Liability

[90] The plaintiffs argued that (i) PW1 and the patient did not have knowledge of the private contractual arrangements between the first and second defendants and (ii) in any event the second defendant owed the patient a non-delegable duty meaning that the second defendant would be liable for the acts and omissions of the first defendant as the second defendant is under a non-delegable duty to treat patients which cannot be discharged by delegating it to a consultant (first defendant) under a contract of services. (*Cassidy v. Ministry of Health* [1951] 1 All ER 574, *Liau Mui Mui v. Dr R Venkat Krishnan* [1999] 1 CLJ 207, *Dr Wong Wai Ping & Anor v. Woon Lin Sing & Ors* [1999] 6 CLJ 23 were cited by the plaintiffs).

[91] In the case of *Farraj and Another v. King's Healthcare NHS Trust and Another* [2009] All ER (D) 158 (cited by the second defendant), the English Court of Appeal after referring to the case of *Gold v. Essex County Council* [1942] 2 KB 293, *Cassidy*'s case (*supra*) and *Roe v. Ministry of Health* [1954] 2 All ER 131; [1954] 2 QB 66 stated that that:

there were two schools of thought as to whether a hospital owes a personal non-delegable duty to provide its patients with skilful treatment and as to whether it is liable for the negligent acts and

A omissions of those who provide treatment, whether they are employees of the hospital or engaged by it as independent contractors. The majority view was that the hospital was liable because it is vicariously liable for the negligence of its employees. But Lord Greene MR in *Gold* and Denning LJ in *Cassidy* and again in *Roe* founded liability on the wider basis that the hospital is liable
B for the negligence of those who administer treatment in its hospital, regardless of their employment status … "[I]t now seems clear, following suggestions by Denning L.J. [in the case of *Cassidy* (*supra*)] and a subsequent decision by the High Court of Australia, that health authorities are under a personal, non-delegable duty to see that care is taken in providing treatment, analogous to the non-
C delegable duty owed by an employer to his employees. … and it has since been decided, in accordance with this principle, that a health authority which contracts out services to an independent contractor is liable for any fault exhibited by the latter. However, the limits of this principle should be noted. It does not apply where an authority enters into a private arrangement to supply services
D by contract: nor, it is submitted, does it apply to negligence on the part of a consultant or surgeon specifically chosen by the patient. (emphasis added)

[92] When cross-examined by the second defendant's counsel, the first defendant (DW1) stated he was an independent contractor and was not
E a salaried employee.

[93] Unlike what the plaintiffs seem to contend that they have no knowledge of the private contractual arrangements between the first and second defendants, there is the evidence to the contrary in that the patient upon admission to the second defendant hospital on 4 November
F 2000 had signed acknowledging that she has read and received a copy of (the conditions of service attached to the registration form (bundle D pp. 1-3) and "irrevocably agree to be bound and comply with the conditions of service". Likewise her husband the first plaintiff, has knowledge of the same conditions having signed as guarantor (bundle D p. 3) where he, *inter alia*, "agree to be bound by all the above conditions".
G And one of the "conditions of service" (bundle D p. 2) at para. 4 reads:

4. Hospital Consultants

All consultants in this Hospital are independent practitioners and it is the responsibility of the consultant to obtain the patient's consent when required for medical or surgical treatment and
H procedures. The instruction of the consultants will be carried out by the Hospital and its nursing staff.

[94] Further the evidence revealed that the patient has specifically chosen the first defendant as her obstetrician and she has engaged the first defendant herself where "the patient was introduced to (the first
I defendant) by her older sister". (NOE DW1 12 April 2011 p. 8).

> [95] Thus based on the available evidence I am satisfied that the exception alluded to in *Farraj*'s case (*supra*) applies and the second defendant is correct in submitting that the doctrine of non-delegable duty is inapplicable.

[48] An appeal was lodged to the Court of Appeal where the learned judge's decision was upheld. Premised on that learned counsel for the second defendant submits that the *Dennis Lee* judgment being an appellate court decision ought to be followed by us. However, on close scrutiny of the grounds of judgment of the Court of Appeal (reported in [2012] 1 LNS 825), the panel members there did not specifically deal with the principle of "non-delegable" duty. What they did in respect of liability of the private hospital there was in respect of the standard of care required of the private hospital and since there was no evidence led as to what that standard of care is, the action against the private hospital was dismissed.

[49] In *Chai Beng Hock* (*supra*), the learned judge there had to deal with the private hospital's reliance of cl. 6 of the agreement between the consultant and the private hospital which reads as follows:

> The Consultant's relationship with the Company shall be that of an independent contractor and not as servant/employee or agent.

[50] Premised on cl. 6, learned counsel for the private hospital in that case submitted that the patient/plaintiff there is bound by that agreement between the private hospital and the independent consultant doctor. The learned judge, at p. 758, rejected the aforesaid contention in the following way:

> [60] When the plaintiff came to SMC (the private hospital) for treatment he expected SMC to provide the treatment. He did not choose Dr Heng to be his doctor. Neither was it his concern that Dr Heng had some special arrangements with SMC. He would not even know which doctor SMC would assign to attend to his injuries.
>
> A medical institution like SMC has a duty to ensure that doctors who practice at the hospital whether employed by them or otherwise have the necessary skill and competency to treat patients. It is no defence for SMC to say that it is not responsible for the wrongdoings of its 'independent contractors' if otherwise these doctors were allowed by SMC to run their practice at the hospital. Neither does it lie in the mouth of SMC to say, through the testimony of DW3 that:
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> > The consultant is responsible for the medical treatment or advice given by the third Defendant to the Plaintiff and SMC.
>
> From the patient's point of view it is SMC that provides the medical services and not any individual doctor plying their trade at the hospital. SMC cannot allow doctors to practice at the hospital but at the same time unwilling to accept responsibility for their wrongdoings. There is no signboard at SMC's entrance which says in bold "TREATMENT IS AT YOUR OWN RISK". SMC's remedy if at all lies in claiming contribution from the doctors if they are found to be negligent and not by denying patients of their rightful claims under cover of clause 6 of the RCA.

[51] Learned counsel for the second defendant submits that *Chai Beng Hock* case is distinguishable to the present case in that the patient did not choose his doctor as was in the present case where the plaintiff chose the first defendant to do the operation.

[52] In *Adventist Hospital & Clinic Services (M) v. Kee Boon Suan & Anor and Another Case* [2015] 8 CLJ 676, the learned Judicial Commissioner opined that the doctrine of non-delegable duty should be adopted as part of the jurisprudence of this country relying on the dicta of Lord Denning in *Cassidy v. Ministry of Health* [1951] 2 KB 343.

[53] Non-delegable duty is described by the High Court of Australia in *Kondis v. State Transport Authority* (1984) 55 ALR 225 *per* Mason J at p. 687 in general terms as follows:

> ... when we look at the classes of case in which the existence of a non-delegable duty has been recognised, it appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed …
>
> The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care … In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.

[54] In *Woodland v. Essex County Council* [2013] 1 All ER 670 Lord Sumption SCJ describes non-delegable duties, at p. 7 as follows:

> [5] The law does not in the ordinary course impose personal (as opposed to vicarious) liability for what others do or fail to do. This is because, as Cory J observed, delivering the judgment of the majority in the Supreme Court of Canada in *Lewis (guardian ad litem of) v. British Columbia* [1997] 3 SCR 1145 at para 17, a common law duty of care 'does not usually demand compliance with a specific obligation. It is only when an act is undertaken by a party that a general duty arises to perform the act with reasonable care'. The expression 'non-delegable duty' has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others.

[55] His Lordship then at p. 15 went on to explain the circumstances upon which a non-delegable duty of care will arise as follows: A

> [23] In my view, the time has come to recognise that Lord Greene in *Gold v. Essex CC* and Denning LJ in *Cassidy v. Ministry of Health* were correct in identifying the underlying principle, and while I would not necessarily subscribe to every *dictum* in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: B
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> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. C
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, change or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. D E
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> (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.
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> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. F G
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> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[56] Lord Sumption opined that a non-delegable duty of care should only be assigned to schools if it is "fair, just and reasonable" to do so. Imposing such a burden on public service providers in his view is not unreasonable and his reasons are as follows: H

(a) The above criteria are consistent with the established policy of the law to protect the inherently vulnerable and highly dependent people under the care and authority of others; I

(b) Parents are legally required to entrust their child to a school and have no knowledge or influence over how the school may delegate their functions or the competency of the delegates;

(c) Liability is not open-ended and public service providers will only be liable for the negligence of independent contractors if the delegate is performing a function(s) for which the school has assumed a duty to perform;

(d) As functions previously performed internally are increasingly delegated by schools to third party contractors, the recognition of limited non-delegable duties replaces those functions for which the public authority would have been vicariously liable;

(e) The responsibilities of fee-paying schools are already non-delegable as they are contractual and it is not rational that an absence of consideration should result in a different outcome when comparable services are provided by a public authority; and

[57] In her supporting judgment, Lady Hale, buttressing Lord Sumption's fifth test above, gave the hypothetical situation of three injured students from different schools and the unjust result it would create if the Court of Appeal's finding had been upheld. Student A, studying in an independent school which provides swimming lessons through a contract it has with another school, can claim under the (presumed) contractual obligation of the school to ensure her safety. Student B, studying in a large state-run school which provides swimming lessons run by the school's staff, has protection as the local authority is vicariously liable for the negligence of its staff. However, Student C, studying in a small state-run school which contracts to an independent service provider to teach swimming lessons, can only be protected if the school can be said to owe her a non-delegable duty of care. The reason the school owes Student C a non-delegable duty of care, according to Lady Hale, is because it has undertaken to teach her.

[58] We are in agreement with the reasons given by Lord Sumption, hence we see no reason why our jurisdiction should not adopt the jurisprudence of non-delegable duty expounded in that case. The development of our common law lies squarely in the hand of the courts and if the time which we live in demands such adoption we must do so. There is little doubt in recent years that the development of private health service providers in Malaysia has grown in leaps and bounds. And these private health service providers are in stiff competition among themselves to attract patients to patronise their hospitals. And they do so on the obvious premise that they provide the best care with the most competent doctors and nurses.

[59] Reverting to the case at hand, learned counsel for the second defendant strenuously argued that the plaintiff is not a patient who had asked for the care of the second defendant. The plaintiff was the one who had engaged the

first defendant at his clinic which was not within the premise of the second defendant. It was the first defendant who had decided that the recommended operation be conducted in the premises of the second defendant. Hence it is submitted that there is no relationship, contractual or otherwise, between the plaintiff and the second defendant. What had occurred was simply that of one of "borrowing" the use of the facilities of the second defendant by the first defendant to conduct his operation on the plaintiff.

[60] It is also submitted that we should take into account of the relationship between the first defendant and second defendant which is basically one of an independent contractor.

[61] Learned counsel further submits that there is no allegation that the services provided by the second defendant for the first defendant to conduct his operation on the plaintiff had not met the standard of care. The negligence complained of is purely centered on the advice and work of the first defendant. The duty of care on the part of the second defendant to provide non-negligent services within their province remains.

[62] In rebuttal, learned counsel for the plaintiff submits that the relationship between the first defendant, the consultant doctor, and the second defendant, the hospital, is of no relevance in determining whether the second defendant has a non-delegable duty. The relationship which matters is the one between the plaintiff and the second defendant. As for the contention that it was the plaintiff who had chosen the first defendant, learned counsel submits that such contention lacks "logic and reason".

[63] In coming to our decision, we keep at the foremost in our minds what Lord Sumption had said and that is, a non-delegable duty of care should be imputed only insofar as it would be fair, just and reasonable in the circumstances of each individual case.

[64] In this case the second defendant is a private hospital providing healthcare to the public for a fee. The plaintiff, though a patient of the first defendant, once admitted as a client/patient in the second defendant, is in our view also a patient of the second defendant. The moment the plaintiff became a patient of the second defendant, he is what Lord Sumption in his first feature of his test call as "a patient vulnerable and/or dependent on the protection of the second defendant against the risk of injury".

[65] As for the second feature, the second defendant being a healthcare service provider, we find little difficulty in the face of the evidence before us "to impute to the second defendant the assumption of a positive duty to protect the plaintiff from harm." As pointed by learned counsel for the plaintiff, DW1 had testified that the second defendant as the hospital and the first defendant as the surgeon needed each other to treat and deliver healthcare services to the public. DW1 also had testified that "... we make sure that their practice is safe for the patients...".

[66] As for the third, fourth and fifth features which concern the employment of a third party as an independent consultant doctor to deliver medical services and the negligence of the third party, the evidence is such that we do not think that the second defendant could dispute that they have been proven. The first defendant here is an independent consultant of the second defendant and he had been found negligent by the learned judge to which there is no appeal.

[67] We should mention here that we agree with the learned judge's reasons in rejecting the second defendant's contention that the engagement of the first defendant's services was the choice of the plaintiff. This is how she put it:

> With all due respect, I find flaws in the above argument. No person would knowingly choose an incompetent or negligent medical practitioner. Again, a medical practitioner's knowledge and skills are so specialised that it would be impossible for any lay person to evaluate whether the medical practitioner has any shortcomings in skill or expertise in order to make an informed choice. How is the issue whether it is the Plaintiff who chooses the tortfeasor or is it by random selection an appropriate basis for liability?
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> The question to be asked is this: Between the Hospital authorities (2nd Respondent) and the Plaintiff – who would be in a better position to evaluate the skill and competencies of the 1st Respondent.
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> The answer to the above question would, in all likelihood be the 2nd Respondent who has the necessary resources as well as the vested interest to ensure that doctors who provide services in the premises managed and owned by the 2nd Respondent have the necessary competence and expertise.

Conclusion

[68] The second defendant owes a non-delegable duty of care to the plaintiff/patient for the simple reason that it, by its nature of existence as a healthcare service provider to the public, has undertaken to ensure that he or she is protected from harm's way. As for learned counsel's contention that the adoption of the non-delegable duty of care will have a "chilling effect" on the health industry, we say that it can be easily solved by displaying visible signage in prominent places in the hospital saying that the hospital will not be liable for the negligence of its doctors. Or alternatively ensure that a disclaimer clause relating to the negligence of its doctors is part of the conditions in the admission forms signed by patients.

[69] For reasons stated above, we make the following orders:

(a) Appeal No. 710 is allowed with no order as to costs;

(b) Judgment in the sum of RM19,632.84 with interest at the rate of 4% per annum from the date of the statement of claim till date of judgment of High Court, and 5% per annum from date of that judgment to full payment of the same be entered for the plaintiff;

(c) Appeal No. 1731, it is dismissed with costs of RM20,000 subject to payment of allocator fees; and

(d) Respective deposits be refunded to the plaintiff and second defendant.